No. 81-2037

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IN THE

Supreme Court of the United States

October Term, 1981

SWISSVALE AREA SCHOOL DISTRICT,
Petitioner

v.

DOROTHY HOOTS, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the trial court's finding that state school authorities, in consolidating school districts under a reorganization plan, were influenced by the racially motivated wishes of white districts to avoid a merger with two predominantly black districts, established a constitutional violation in the absence of a further finding that the state authorities or white districts would have acted differently but for the racial motive.

2. Whether a finding that a constitutional violation occurred in the drawing of certain school district boundaries, pursuant to a reorganization plan, and that an interdistrict desegregation remedy of some dimension was therefore appropriate, shifted to all school districts in the area the burden of proving that they were neither involved in nor affected by the violation.

PARTIES IN THIS COURT

In addition to the Swissvale Area School District, the following parties were appellants in the court of appeals and are petitioners in this Court: Churchill Area School District, Edgewood School District, Turtle Creek Area School District, the Commonwealth of Pennsylvania, the Pennsylvania State Board of Education, and W. Deming Lewis, as its chairman. The Allegheny Intermediate Unit Board of School Directors and Edward X. Hallenberg, as its president, were appellants in the court of appeals but are not expected to file petitions for a writ of certiorari in this Court.

The following parties were appellees in the court of appeals and are respondents in this Court: Dorothy Hoots, individually and as mother of her children Janelle Hoots and Jannie Hoots; Mrs. Addralace Knight, individually and as mother and natural guardian of her children Ronald Knight, Loretta Knight, Terrance Knight, Marc Knight and Byron Knight; Barbara Smith, individually and as mother and natural guardian of her children Tawanda Smith, Tevela Smith, Joseph Smith, Wesley Smith, and Eric Smith—on behalf of themselves and all others similarly situated—Mae Helen Woody and Juanita Jordan.

The General Braddock Area School District, though nominally an appellant in the court of appeals, was in reality an appellee and is a respondent in this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES IN THIS COURT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
A. The Facts	4
B. The Procedural History	7
C. Rulings Below	9
REASONS FOR GRANTING THE WRIT	13
I. In Holding That the Fourteenth Amendment Was Violated Even Without a Finding That Either the Boards or the Surrounding Districts Would Have Acted Differently But for Racial Considerations, the Courts Below Disregarded the Causation Rule Laid Down by This Court in *Arlington Heights*	13
II. In Holding That the Trial Court's Finding of an Inter-district Constitutional Violation Shifted to Each of the Surrounding School Districts the Burden of Proving Its Non-Involvement, the Court of Appeals Adopted an Erroneous Legal Standard Contrary to This Court's Decision in *Milliken I*	18
CONCLUSION	24

TABLE OF AUTHORITIES

Cases: Page

Ayers v. Western Line Consolidated School District, 555 F. 2d 1309 (5th Cir. 1977) 15

Arlington Heights v. Metropolitan Housing Development Corporation, 429 U. S. 252 (1977) 13, 14

Columbus Board of Education v. Penick, 443 U. S. 449 (1979) 23

Dayton Board of Education v. Brinkman, 433 U. S. 406 (1977), (*Dayton I*) 23

Dayton Board of Education v. Brinkman, 443 U. S. 526 (1979) (*Dayton II*) 23

Evans v. Buchanan, 582 F. 2d 750 (3d Cir. 1978) 18, 22

Givhan v. Western Line Consolidated School District, 439 U. S. 410 (1979) 15, 16, 17

Hoots v. Pennsylvania, 334 F. Supp. 820 (W. D. Pa. 1972) .. 2

Hoots v. Pennsylvania, 495 F. 2d 1095 (3d Cir.), cert. denied, 419 U. S. 884 (1974) 2, 8

Hoots v. Pennsylvania, 587 F. 2d 1340 (3d Cir. 1978) 2, 8

Hoots v. Pennsylvania, 639 F. 2d 972 (3d Cir. 1981) 2, 9

Hoots v. Pennsylvania (W. D. Pa., 71-258, April 16, 1981) .. 2

Hoots v. Pennsylvania, 510 F. Supp. 615 (W. D. Pa. 1981) .. 9

Hoots v. Weber (3d Cir. May 2, 1979) 9

Hoots v. Weber (3d Cir. September 9, 1980) 9

Keyes v. School District No. 1, 413 U. S. 189 (1973) 19, 20, 23

Milliken v. Bradley, 418 U. S. 717 (1974) (Milliken I) 18, 20, 21, 23

Mt. Healthy City Board of Education v. Doyle, 429 U. S. 274 (1977) 13, 14, 15, 17

TABLE OF AUTHORITIES (Continued)

Statutes:

	Page
28 U. S. C. § 1254(1)	2
42 U. S. C.:	
§ 1981	7
§ 1983	7
Act of September 12, 1961, P. L. 1283, No. 561, 24 P. S. § 2-281 et seq.	5, 6, 16
Act 299 of August 8, 1963, P. L. 564, No. 299, 24 P. S. § 2-290 et seq.	3, 6, 7, 16, 18
Act 150 of July 8, 1968, P. L. 299, No. 150, 24 P. S. § 2400.1 et seq.	3, 6, 7, 18

United States Constitution:

First Amendment	14, 15
Fourteenth Amendment	4, 13

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is unreported and is reproduced in the Appendix to this petition at 1a.[1] The opinion of the District Court for the Western District of Pennsylvania declaring the existence of a constitutional violation, entered on May 15, 1973, is reported at 359 F. Supp. 807 and is reproduced at App. 1c. Its opinion of March 5, 1981 identifying the districts eligible to be included in the remedy, is reported at 510 F. Supp. 615 and is reproduced at App. 1d. Its final opinion and order, entered on April 28, 1981 (W. D. Pa., 71-258) is unreported and is reproduced at App. 1e. The following additional decisions of the district court and the court of appeals have been entered in this case: *Hoots v. Pennsylvania,* 334 F. Supp. 820 (W. D. Pa. 1972); *Hoots v. Pennsylvania,* 495 F. 2d 1095 (3d Cir.), cert. denied, 419 U. S. 884 (1974); *Hoots v. Pennsylvania,* 587 F. 2d 1340 (3d Cir. 1978); *Hoots v. Pennsylvania,* 639 F. 2d 972 (3d Cir. 1981); *Hoots v. Pennsylvania* (W. D. Pa., 71-258, April 16, 1981).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on February 1, 1982. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

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1. Petitioners Swissvale Area School District, Turtle Creek Area School District, and Edgewood School District have filed, under separate cover, a Joint Appendix to their petitions. References to this Joint Appendix will be denoted by "App." followed by the page number. All page references of the form "____a" are to the Appendix filed by the petitioners, then appellants, in the court of appeals.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Pennsylvania statutes under which the Allegheny County Board of School Directors and the Pennsylvania State Board of Education acted in this case provide, in relevant part:

> Act 299 of August 8, 1963, P. L. 564, No. 299, § 293, 24 P. S. § 2-293
>
> Approval of Plans.—(a) When any plan of organization of administrative units for a county is found to conform to the standards for approval of administrative units adopted by the State Board of Education, the Department of Public Instruction shall cause such plan to be placed upon the agenda of the Council of Basic Education. The Council of Basic Education shall review all plans placed upon its agenda, and approve such plans as it deems wise in the best interests of the educational system of the Commonwealth. Except as hereinafter provided, no plan of organization of administrative units shall be approved in which any proposed school district contains a pupil population of less than four thousand (4,000), unless when factors of topography, pupil population, community characteristics, transportation of pupils, use of existing school buildings, existing administrative units, potential population changes and the capability of providing a comprehensive program of education are considered by the Council of Basic Education as requiring the approval of a plan of organization of administrative units in which one or more proposed school districts contains a pupil population of less than four thousand (4,000).
>
> Act 150 of July 8, 1968, P. L. 299, No. 150, § 3, 24 P. S. § 2400.3
>
> Consideration of Plans.—The State Board of Education shall review all plans and approve such plans as it deems wise in the best interests of the

educational system of the Commonwealth. No plan of organization of administrative units shall be approved in which any proposed school district contains a pupil population of less than four thousand (4,000), unless when factors of topography, pupil population, community characteristics, transportation of pupils, use of existing school buildings, existing administrative units, potential population changes and the capability of providing a comprehensive program of education are considered by the State Board of Education as requiring the approval of a plan of organization of administrative units in which one or more proposed school districts contains a pupil population of less than four thousand (4,000). Pupil population as used herein shall mean the average daily membership for the school year 1966-1967 including kindergarten or grade one through grade twelve.

The Fourteenth Amendment to the United States Constitution provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Facts

This suit, filed in 1971, pertains to alleged discrimination in the consolidation of formerly independent municipal school districts in Pennsylvania during a school district reorganization process mandated by statute in the 1960's. The school districts involved are located in the central eastern part of Allegheny County, just east of Pittsburgh. Neither the municipalities, nor the county, nor the state has any history of *de jure* segregation.

The constitutional violation found by the district court was the creation of the General Braddock Area School District ("GBASD"), a 39%[2] black unit surrounded by other districts more than 90% white. (App. 9c). GBASD was formed by the consolidation of the former municipal school districts of Rankin (51% black), Braddock (72% black) and North Braddock (16% black). (App. 9c).

Petitioners are school districts, all at least 90% white, in the vicinity of GBASD and created in the same reorganization process. Swissvale Area School District comprises the former municipal districts of Swissvale and Braddock Hills. Turtle Creek Area School District consists of the former municipal districts of Turtle Creek and East Pittsburgh. Churchill Area School District, an earlier amalgam of four municipal districts, was not altered during the statutory reorganization process involved here. Edgewood School District remained an independent municipal district throughout the period of reorganization. All of these districts, together with GBASD, have been dissolved and merged into a single New District pursuant to the trial court's remedial order in this case, and this district, now called Woodland Hills School District, has been in operation since September 1981.

During the 1960's, the Commonwealth of Pennsylvania on three occasions enacted legislation to reorganize its public school districts. The Act of September 12, 1961, 24 P. S. § 281 ("Act 561") was superseded, but not substan-

2. Percentage as of 1970.

tively altered, by the Act of August 8, 1963, 24 P. S. § 2-290 et seq. ("Act 299") and that, in turn, by the Act of July 8, 1968, 24 P. S. § 2400.1 et seq. ("Act 150"). Each of these statutes directed county boards of education to prepare plans for the reorganization of school districts within their counties and instructed the State Board of Education ("the State Board") to review those plans. (App. 7a).

On December 18, 1962 the Allegheny County Board of School Directors ("the County Board") adopted a reorganization plan pursuant to Act 561. It proposed to consolidate Rankin and Braddock, the two predominantly black municipal districts, with three predominantly white ones—North Braddock, East Pittsburgh, and Braddock Hills. The new unit would have been over 70% white. The plan, however, was never put into effect; before the State Board could review it, Act 561 was superseded by Act 299. (696a).

On May 11, 1964 the County Board, pursuant to Act 299, again prepared a school district reorganization plan. Again it proposed to consolidate Rankin and Braddock with three predominantly white municipal districts—North Braddock, East Pittsburgh, and this time Turtle Creek (in place of Braddock Hills)—into an administrative unit that, as of 1967, would have been 73% white. (696a; App. 15c). Braddock Hills, Swissvale, and Edgewood were to be consolidated into another unit, while Churchill was to remain unchanged. Turtle Creek and East Pittsburgh filed appeals with the State Board requesting that they be removed from the consolidated unit proposed by the County Board and joined together as a separate unit. They cited, among other things, the financially unsatisfactory condition of the Rankin, Braddock and North Braddock systems. (697a-698a). On November 25, 1965 the State Board, after a hearing, granted this petition and revised the County Board's plan so as to create one district consisting of Rankin, Braddock and North Braddock and another consisting of East Pittsburgh and Turtle Creek. In a supple-

mental order filed a year later, the State Board explained this decision on the ground that traffic congestion and frequent flooding would impede access and unacceptably lengthen the time in transit between Turtle Creek and East Pittsburgh and the other three districts.[3] In all other respects, the State Board approved the County Board's plan.

The only feature of the Act 299 plan of reorganization that became effective, however, was the establishment of Churchill. Litigation in the state courts challenging the other arrangements was still pending when, in July 1968, Act 299 was superseded by Act 150. (699a-700a).

On October 7, 1968, the County Board, pursuant to Act 150, proposed yet a third reorganization plan, closely patterned on the one approved by the State Board two years earlier. Rankin, Braddock and North Braddock were to be merged into GBASD; Turtle Creek and East Pittsburgh into the Turtle Creek Area District; Swissvale and Braddock Hills, which had been functioning as a single unit since 1964 under a joint operating agreement, into the Swissvale Area District. Edgewood was to remain independent. Appeals were filed to the State Board by Rankin, Braddock and North Braddock, each requesting that it be allowed to continue as separate districts. Rankin requested alternatively that it be joined with Swissvale. On May 9, 1969, the State Board denied these appeals and approved the County Board's reorganization plan. (700a-702a).

B. The Procedural History

On June 9, 1971, parents of children attending school in GBASD filed this action under the Federal Civil Rights Act, 42 U. S. C. §§ 1981 and 1983, asserting that their rights under the Equal Protection Clause of the Fourteenth Amendment had been violated. The principal defendants

3. This Supplemented Order 2-10 was not placed in the record or before the district court. We appended it to our brief in the court of appeals and asked that court to take judicial notice of it. (Swissvale Br., 19 and Appendices A and B thereto).

were the Commonwealth of Pennsylvania and the State and County Boards. The complaint did not designate the petitioner school districts as defendants and the district court denied the state's motion to join them as necessary parties. Although the state then invited them to intervene, none did so. (App. 24c).

The case went to trial on December 5, 1972. (55a-280a). The defendants called no witnesses and introduced only two documents (showing moneys made available by the state to, and expended per pupil by, GBASD in comparison to other districts. (401a-405a). On May 15, 1973, the district court entered an opinion and order determining that the creation of GBASD was a constitutional violation and directing the defendants to prepare a comprehensive remedial plan "to achieve the greatest possible degree of desegregation within the public schools of the central east-Allegheny County." (App. 28c).

In June 1973, Turtle Creek and Churchill filed petitions to intervene in order to take an appeal. The district court's denial of these motions was affirmed by the Third Circuit. *Hoots v. Pennsylvania,* 495 F. 2d 1095 (3d Cir.), cert. denied, 419 U. S. 884 (1974).

Meanwhile, the remedial phase of the case went forward in the district court. Swissvale and Churchill were given leave to intervene in these proceedings solely on the issue of remedy. (996a). Eventually, in May 1979 all the potentially affected districts were made necessary parties on the same limited basis. (853a).

From 1973 to 1980 there were extensive hearings on a variety of plans presented by the state, some contemplating a consolidation of school districts, others the assignment of pupils from GBASD to secondary schools in nearby districts. On four occasions during the remedial phase of the case, plaintiffs sought relief in the court of appeals. Their appeal from an order denying approval of a consolidation plan was dismissed for lack of appellate jurisdiction. *Hoots v. Pennsylvania,* 587 F. 2d 1340 (3d Cir. 1978). Two applications for writs of mandamus were denied.

Hoots v. Weber (3d Cir. May 2, 1979); and *Hoots v. Weber* (3d Cir. September 9, 1980). Finally, in an appeal asserting denial of injunctive relief as the basis of appellate jurisdiction, this Court ordered the district court to expedite its consideration of the case, so as to be able to prescribe a remedy within 90 days, in time for the 1981-1982 school year. *Hoots v. Pennsylvania*, 639 F. 2d 972 (3d Cir. 1981).

On March 5, 1981, the trial court entered an opinion and order reaffirming its 1973 finding of violation and holding that a multidistrict remedy could appropriately include Swissvale, Turtle Creek, Churchill, Edgewood, General Braddock and two other districts. *Hoots v. Pennsylvania*, 510 F. Supp. 615 (W. D. Pa. 1981). (App. 12d-13d). On April 28, 1981, the district court entered a further order directing that the petitioner districts be dissolved and merged into a single New District. (App. 9c). Petitioners took an appeal, challenging the trial court's underlying 1973 determination of constitutional violation as well as its remedial orders of March 5 and April 28, 1981. On February 1, 1982, the court of appeals affirmed the judgments of the district court.

C. Rulings Below

In its 1973 opinion holding that the creation of GBASD was a violation of the Fourteenth Amendment, the district court found, among other things, that by combining Braddock, North Braddock and Rankin into a single unit, the County and State Boards created a racially segregated school district (App. 21c; Finding 56); that the Boards "knew or should have known that they were creating a racially segregated school district" (App. 18c; Finding 50); and that "the natural, foreseeable and actual effect" of their action was "to perpetuate, exacerbate and maximize racial segregation within the public schools of this central eastern portion of Allegheny County" (App. 22c; Finding 57).

The court further found that the "school districts in the vicinity of Braddock and Rankin continually sought to avoid being included in a school district with Braddock and Rankin because of the high concentration of blacks within the Braddock and Rankin School Districts" (App. 14c; Finding 39); that the Boards devised the plan of organization that resulted in GBASD "to satisfy the desires of as many of the surrounding municipalities as possible to be placed in a school district which did not include Braddock and Rankin" (App. 22c; Finding 59); and that because the Boards "were influenced by the desires of the surrounding municipalities to avoid being placed in a school district with Braddock and Rankin because of the high concentration of blacks within these two municipalities, race was a factor, at least indirectly, in the formation of the school district composed of Braddock, North Braddock and Rankin". (App. 22c; Finding 60).

In its March 5, 1981 remedial opinion, the district court justified the inclusion of the petitioner districts in the remedy on the ground that the creation of GBASD was the "result of an interdistrict violation conducted by the state during the reorganization process which included the redrawing of school district boundaries in that part of Allegheny County." (App. 7d). In response to the arguments of the neighboring school districts that they should not be included because there was no finding that they had any involvement in the reorganization process, the court held that a "multidistrict remedy can be applied to surrounding districts that have not been found to have committed a constitutional violation themselves where their boundaries were drawn or redrawn during the course of the same violation which created the segregated school district." (App. 8d). Here, the court found, "the State and County Boards violated the constitution in the manner in which the school district lines were drawn and so all surrounding districts can be implicated in a remedy." (App. 9d). "Neither," it added, "are the surrounding districts innocent in the reorgani-

zation plan which created General Braddock," since "the school districts in the vicinity of Braddock and Rankin continually sought to avoid being included in a school district with them due to the high concentration of blacks." (App. 10d).

In the court of appeals Swissvale contended that the district court had failed to make the constitutionally requisite findings of segregative intent on the part of the State and County Boards; that such findings would have been clearly erroneous in any event; and that the findings of racially motivated efforts of "surrounding municipalities" to avoid a merger with Rankin and Braddock were both clearly erroneous and legally unsupportive of the holding of constitutional violation. In addition, Swissvale maintained that even a valid finding that the Boards or the surrounding municipalities were motivated in part by racial considerations would not have established a constitutional violation in the absence of a further finding that the Board or the municipalities would have acted differently but for the racial factor. Finally, Swissvale argued that its inclusion in the remedy was unwarranted in the absence of evidence or findings that it had participated in the violation, that the drawing of its boundaries was a result of the violation (rather than merely something done "during the course of" the same reorganization process), or that it was otherwise affected by the violation.

The court of appeals, in affirming the trial court's judgments, held that the trial court *had* made the required findings of segregative intent and that these findings were not clearly erroneous. We do not now challenge those rulings. The court of appeals did not address Swissvale's contention that the holding of constitutional violation failed for want of a finding that the racial motive was a but-for cause of the action in question. This issue is one of two we ask this Court to review. Finally, in upholding the application of the trial court's multidistrict remedy to all

of the districts involved, the court of appeals ruled that the trial court's determination of an interdistrict violation had shifted to each district the burden of proving its non-involvement in that violation. The allocation of the burden of proof is the second issue we present to the Court in this petition.

REASONS FOR GRANTING THE WRIT

I. In Holding That the Fourteenth Amendment Was Violated Even Without a Finding That Either the Boards or the Surrounding Districts Would Have Acted Differently But for Racial Considerations, the Courts Below Disregarded the Causation Rule Laid Down by This Court in *Arlington Heights.*

The courts below failed to adhere to the rule established by this Court in *Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U. S. 252 (1977) that official action, although motivated in part by racial considerations, is unconstitutional only if it is found that the action would not have been taken but for the racial motive. Neither court below made such a determination, though the point was pressed by Swissvale upon the court of appeals both in brief (Swissvale Br. 32-35) and in oral argument.

In *Arlington Heights, supra,* this Court declared (429 U. S. at 270, n. 21):

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.

This principle was further elaborated in *Mt. Healthy City Board of Education v. Doyle,* 429 U. S. 274 (1977), involving a teacher's claim that his contract had not been

renewed because of his engagement in First Amendment activities. The lower courts both upheld this claim, but this Court reversed, holding that even if the protected conduct played a "substantial part" in the decision not to renew, this would not amount to a constitutional violation justifying remedial action if the same decision would have been reached even had that conduct not occurred. "A rule of causation", said the Court, "which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." (429 U. S. at 285). Hence, once the teacher had carried his initial burden of showing that his conduct was protected and was a "motivating factor" in the board's decision not to rehire, the district court should have gone on to determine whether the board "had shown by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct. (429 U. S. at 287).

This principle applies fully to the present case. The district court, having found that the decision to establish GBASD was, at least in part, racially motivated, was, like the district court in *Mt. Healthy,* obligated to inquire whether the same decision would have been made anyway. Similarly, after finding that the actions of the Boards were "influenced" by the desires of the "surrounding municipalities" and that these in turn were racially based, the court was required to determine whether either the municipalities or the Boards would have acted differently had the racial factor been absent. To be sure, the burden of proof on causation would have rested with the defendants; but here, as in *Mt. Healthy,* that fact does not excuse the district court's failure to make a finding as to whether the burden was met.

It is no answer that this case was tried before the decisions in *Arlington Heights* and *Mt. Healthy,* and that the district court could not be expected to have anticipated those decisions. That was equally true in *Mt. Healthy*

itself. Any doubt on this score was removed by *Givhan v. Western Line Consolidated School District*, 439 U. S. 410 (1979). That case, too, involved a school teacher's First Amendment claim that she had been dismissed for criticizing the practices and policies of the school district. A trial conducted prior to *Mt. Healthy* resulted in a decision by the district court that the teacher's criticisms were protected by the First Amendment and were "the primary reason" for the school authorities' failure to renew her contract, indeed that the defendants' "motivation . . . was almost entirely a desire to rid themselves of a vocal critic . . .". See *Ayers v. Western Line Consolidated School District*, 555 F. 2d 1309, 1314 (5th Cir. 1977). The court of appeals, in a decision handed down after *Mt. Healthy* and modeled upon it, held that although the district court had not made an express finding as to whether the criticisms were a *but for* cause of the dismissal, "on this record the [defendants] do not, and seriously cannot, argue that the same decision would have been made without regard to them." *Id.* at 1315. It concluded, however, that the criticisms, having been privately expressed to the school principal, were protected by the First Amendment. This Court reversed on both points: It held that the criticisms, private or not, were constitutionally protected but that the case should have been remanded for a finding on the "same decision anyway" question. In language equally applicable to the case at bar, the Court said (439 U. S. at 417):

> Since this case was tried before *Mt. Healthy* was decided, it is not surprising that respondents did not attempt to prove in the District Court that the decision not to rehire petitioner would have been made even absent consideration of her "demands". Thus, the case came to the Court of Appeals in very much the same posture as *Mt. Healthy* was presented to this Court. And while the District Court found that petitioner's "criticism" was the "primary" reason

for the School District's failure to rehire her, it did not find that she would have been rehired *but for* her criticism. Respondents' *Mt. Healthy* claim called for a factual determination which could not, on this record, be resolved by the Court of Appeals.

If a remand was required in *Givhan*, where the district court found that the defendants' motivation was "almost entirely" illicit and the court of appeals was convinced that the record would not support a finding of "same decision anyway"—a remand is all the more imperatively required in the present case, where no such finding was made and no such conviction warranted.

Indeed, even with a record compiled almost exclusively by the respondents and with the burden of proof assigned to the school authorities, the district court would have been hard-pressed to find that the actions either of the surrounding municipalities or of the Boards would have been different but for the racial factor. The record does not indicate that Swissvale, Churchill, or Edgewood ever opposed a merger with Braddock or Rankin on any grounds at all, let alone racial grounds.[4] Those districts

4. Braddock Hills, a former municipal district merged with Swissvale in the third (1969) round of reorganization into what is now the Swissvale Area School District, requested the County Board in 1964 not to include it in the proposed Act 299 merger package (Unit 16) with the GBASD trio and East Pittsburgh as it had two years earlier in the Act 561 reorganization proposal. Accordingly, the Board assigned it instead to a separate grouping with Swissvale and Edgewood (*supra*, p. 6). However, any suggestion of racial motivation, direct or indirect, in this action is conclusively negated by the fact that the County Board simultaneously replaced Braddock Hills in the Unit 16 package with Turtle Creek, a much larger and even whiter (100%) district, with the result that Rankin and Braddock were now bonded with three surrounding white districts in a unit substantially more racially integrated than it would have been but for the substitution of Turtle Creek for Braddock Hills (310a, 331a-336a, 498a, 582a).

that did seek to avoid such a merger—Turtle Creek and East Pittsburgh—gave a reason, Rankin and Braddock's financial plight, that was not only plausible but was acknowledged to be an alternative motive even by those sources cited by the district court to support its finding of racial motivation. (125a, 592a). More basically, the record showed that nearly all of the white districts in the area opposed mergers with one another for reasons that could have had nothing to do with race. Edgewood declined to merge with Swissvale; Churchill with Braddock Hills (587a-590a); North Braddock with Turtle Creek (309a-310a); and Turtle Creek with the all-white Gateway district bordering it on the east (303a, 582a). It is impossible to believe that these districts, so jealous of their independence, and receptive only to liaisons they considered affirmatively advantageous, would have acquiesced in a consolidation with the financially straightened Braddock and Rankin even had they been all-white. It is equally impossible to believe that the Boards would have been less deferent to the wishes of these municipalities had those wishes been entirely non-racial and perceived as such.

We do not, of course, ask the Court to review this factual issue either now or later. We cite these facts only to emphasize that the error committed by the courts below was not harmless error and that the instant case is, if anything, a far stronger one for remand than *Givhan* was. The importance this Court attaches to the *but for* rule is clearly indicated by its disposition of the *Mt. Healthy* and *Givhan* cases, just as the decision below indicates how lightly the courts of appeals may be inclined to take the rule unless it is enforced.

II. In Holding That the Trial Court's Finding of an Interdistrict Constitutional Violation Shifted to Each of the Surrounding School Districts the Burden of Proving Its Non-Involvement, the Court of Appeals Adopted an Erroneous Legal Standard Contrary to This Court's Decision in *Milliken I*.

The multidistrict remedy ordered by the trial court rested essentially on two grounds: first, that such a remedy "can be applied to surrounding districts that have not been found to have committed a constitutional violation themselves where their boundaries were drawn or redrawn during the course of the same violation which created the segregated school districts" (App. 8d); and second, that in any event, the surrounding school districts were *not* "innocent" because they had "continually sought to avoid being included in a school district with [Braddock and Rankin] due to the high concentration of blacks" (App. 10d). We do not quarrel with the proposition that school district boundaries drawn by state officials as part of a constitutional violation can be erased in the remedy, even though the affected districts were blameless; and we assume for purposes of this petition that the trial court meant no more than this.[5] Nor do we deny, for present purposes,

5. Alternatively, the trial court might have meant that a district may be included in the remedy merely because its boundaries were drawn *at the same time* as the constitutional violation, *i.e.*, in the course of the same reorganization process. That proposition is clearly not the law. It would warrant the inclusion of districts without regard to whether they would ever have been linked to Braddock or Rankin had no violation occurred. Taken literally, it would apply to all of the districts in Allegheny County, indeed in Pennsylvania, that were created under Acts 299 and 150. The fact that GBASD's eastern boundary with Turtle Creek may have been drawn as the result of a constitutional violation does not justify the inclusion of Swissvale in the remedy merely because its border with GBASD was established by the same reorganization plan, absent evidence that Swissvale or its boundaries were somehow affected by the violation.

that any district whose boundaries resulted, even indirectly, from its own racially motivated efforts to avoid a merger with Rankin or Braddock could properly be included in the remedy; and we assume that the district court's findings on this point were meant to apply to *all* of the districts included in the remedy. The court of appeals so interpreted the findings, noting that the trial court had "tailored the relief granted to fit the actual showing of *de jure* discrimination by *all* of the districts involved." (App. 27a).

Our contention is that the court of appeals, in approving the trial court's findings, misallocated the burden of proof, assigning it to the defendant school districts. Citing this Court's decision in *Keyes v. School District No. 1,* 413 U. S. 189 (1973) and its own prior decision in *Evans v. Buchanan,* 582 F. 2d 750 (1978), the court below stated:

> "The district court having found a constitutional violation and having properly determined that an interdistrict remedy was appropriate because the violation was committed in the process of drawing school district lines, we believe that the burden of proof shifted to each defendant school district to establish that that district in particular was not involved in the violation.
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> In light of the burden of proof, we are not persuaded that the district court committed error in rejecting the defendants' claims that not race but factors such as "transportation difficulties," the quality of the school districts' curricula, and so on, lay behind the noninclusion of Edgewood, Swissvale, Turtle Creek, and Churchill."

(App. 29a-30a).

The shifting of the burden may well have determined the outcome. The record contained no evidence whatever that Swissvale, Edgewood or Churchill ever sought to avoid a merger with Braddock and Rankin either on racial or any other grounds; no evidence that the failure of the

State and County Boards to include them in a merger with GBASD was motivated either by race or by deference to their supposed wishes; no evidence that they were in any way affected by the constitutional violation (if any) that occurred when Turtle Creek was separated from GBASD; or that their inclusion in the remedy was necessary to recreate the district that would have existed had all actors been colorblind. Only a reversal of the burden of proof made it possible for the court of appeals to uphold the district court's finding vis-a-vis Swissvale, Edgewood, and Churchill.

In effect, the court below adopted the burden-shifting rule this Court had established in *Keyes* for the single-district situation but had refused in *Milliken v. Bradley*, 418 U. S. 717 (1974) (Milliken I) to use as the basis for a multidistrict remedy. In so doing, the court below misapplied the rule in *Keyes* and acted contrary to the clear implications, if not the letter, of *Milliken I*.

In *Keyes*, this Court held that a "finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious." It shifts to school authorities "the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions." (413 U. S. at 208). In *Milliken I*, however, the Court adopted no such approach. It held that a multidistrict remedy embracing Detroit and surrounding suburban system's was inappropriate because the plaintiffs, while proving widespread *de jure* violations within the Detroit school system, had failed to show that these violations generated interdistrict segregative effects. The Court stressed that "no single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." (418 U. S. at 741-42). Thus, it declared:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate *to eliminate the interdistrict segregation directly caused by the constitutional violation.* (418 U. S. at 744-45) (Emphasis added).

The clear import of this language is that a school district may not be ordered out of existence as part of a multidistrict desegregation remedy unless there has been an affirmative showing—not merely an unrebutted presumption—that the inclusion of that district in the remedy is necessary to eliminate the segregative effects "directly caused by the constitutional violation."[6]

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6. To be sure, *Milliken I* was a case in which the proven effects of the violation were confined to a single district, whereas here the violation by its very nature touches more districts than one. The distinction, however, is without significance. The same considerations that preclude a desegregation remedy embracing districts A, B, C, and D on evidence showing a violation in and affecting only A, likewise preclude such a remedy on evidence of a violation touching only A and B.

We do not say there are *no* circumstances in which the burden of proof may shift to the surrounding school districts. In the Third

The reasons for this distinction between the single-district situation in which a showing of localized violation shifts the burden of proof with respect to the scope and effects of that violation, and the multidistrict situation in which it does not, are readily understandable. For one thing, a decree ordering the consolidation of independent school districts is more drastic medicine than a system-wide racial balancing decree within a single district; for it subordinates not only neighborhood school values but, in addition, the important values associated with local control of public education. Moreover, in a single-district case, once it is shown that school authorities have committed unconstitutional acts of purposeful segregation in one area, it is not unreasonable to assume that those same authorities may have committed other such acts elsewhere in the district. At all events, it is fair that the burden of proof as to the scope of the violation and its effects should be borne by the proven wrongdoer rather than the innocent victim. In contrast, evidence that the authorities in one district have acted with segregative intent is no basis for inferring that authorities in other districts have done so, and no

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6. (Cont'd)

Circuit's previous decision in *Evans v. Buchanan*, 582 F. 2d 750 (3d Cir. 1978), the Wilmington case, the court explained (at 764) that the burden shifted only because of a combination of circumstances peculiar to that case: Delaware's historical pattern of statutory *de jure* segregation, the defendant's admission that it was infeasible to separate out the incremental segregative effects of the violations from those resulting from demographic changes, and the defendant's footdragging obstruction to desegregation over a twenty-six year period. In sharp contrast, Pennsylvania, like Michigan and Ohio, and unlike Delaware, has not operated a statutory dual school system; there is no problem here of separating the effects of the alleged violation from the effects of demography; and neither court below has suggested, or could fairly suggest, that the petitioners are to blame for the delays that have inordinately prolonged this litigation.

reason in equity for requiring them to prove their innocence.

The allocation of the burden of proof was not only critical in the instant case, but has been a central issue in most of this Court's desegregation cases over the last decade. Both *Keyes* and *Milliken I* recognized that the purpose of the desegregation remedy was to eliminate the effects of the underlying violation and restore the situation that would have existed in its absence; the two decisions differed primarily in the assignment of the burden of proof as to the nature and extent of those effects. Subsequent decisions have further refined the burden-of-proof rules for the single-district situation. *Dayton Board of Education v. Brinkman,* 433 U. S. 406 (1977), (*Dayton I*); *Columbus Board of Education v. Penick,* 443 U. S. 449, 458, n. 7 (1979); *Dayton Board of Education v. Brinkman,* 443 U. S. 526, 540-41 (1979) (*Dayton II*).

Given the extraordinary difficulty of proving by affirmative evidence the presence or absence of segregative intent, or the existence or non-existence of a causal relationship between unconstitutional acts and observed conditions of segregation, it is not surprising that the outcome of school desegregation cases very often depends on how the burdens of proof are allocated. The question presented here is therefore of the utmost importance to the judicial administration of multidistrict desegregation remedies. If, as we maintain, the question has already been answered, at least by strong implication, in *Milliken I,* this Court should make that clear. If, on the other hand, it is viewed as still an open question, this Court should answer it.

CONCLUSION

For the reasons stated, this Court should grant the petition for a writ of certiorari and review the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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